MANSOR MAT TAHIR

v.

KADI DAERAH PENDANG, KEDAH & ANOR.

HIGH COURT MALAYA, ALOR SETAR
MOHD. ARIFF OTHMAN J
[ORIGINATING MOTION NO. 32-09-1987]
7 JUNE 1988

ISLAMIC LAW: *Marriage solemnized in Thailand - Registration under s. 23 Islamic Family Enactment - Not automatic right even if in compliance with s. 23 - Discretion exercised - Available information - Clause (b) allows for further details - Circumstances of this case - Right of appeal after decision made - Remedy not exhausted yet.*

CONTRACT: *Specific relief - Section 44 - Judge to order specific act by public official - Five conditions cumulative - Section 45 - Procedure - Conditions not fulfilled.*

The applicant and one Normala bte Jusoh had married on 15 January 1986 and marriage was solemnized in Patani, Thailand, upon return, applicant sought to register the marriage and had adduced proper marriage certificate and form but the respondents had to date not registered the said marriage. The applicant applied for an Order of Mandamus under O. 53 of RHC 1980 against the respondent. On 26 March 1987 the applicant applied for leave to apply for an Order of Mandamus and leave was granted on 16 June 1987. On 12 September 1987 the application for Order of Mandamus was heard.

Held:

[1] Applicant had resorted to alternative procedure under s. 23 in order to get his marriage registered. Applicant had complied with Clause (a) and Clause (c) of s. 23. Further, under Clause (b) the Registrar may require for further details to be submitted by the applicant.

[2] Whether the respondent should register or not depends on whatever information obtained from available sources. Registration is not a matter of automatic right assuming that applicant had fulfilled all the pre-requisites. The exercise of discretion depends on whatever information available to them which the Registrar may require. If the Registrar is dissatisfied, he has every right to refuse to register. The right is not an inherent or unequivocal right.

[3] Section 25(6) was wrongly given as reason for not registering. It is only in respect of voluntary registration of Muslim Marriage prior to this Enactment under any law and is therefore irrelevant for the purpose of registering marriage under this Enactment.

[4] Section 108 allows any person aggrieved with the Registrar's decision to appeal. The remedy should be exhausted first. However, no decision has been made yet to which an appeal lies to the Court of Appeal. As seen from the circumstances and history of the applicant's marriage, it is not surprising that to date the respondents have not registered the marriage.

[5] Section 44 of the Specific Relief Act lays down 5 cumulative conditions which must be fulfilled whereas s. 45 sets out the procedure to be adopted. In the present case, three conditions under s. 44 and s. 45 have not been complied with in the sense that enforcement of the right has been denied to the applicant.

[6] According to the Ninth Schedule to the Federal Constitution Federal List I item 4(e) Islamic personal law are excluded but included in the state List II. Article 33(B)(1) of the Kedah State Constitution reinforces the argument that High Court has no jurisdiction over the applicant's conjugal right. Parties are Muslim and issue involves personal law. Thus, the High Court has no jurisdiction to order Mandamus.

[Application dismissed with costs.]

Cases referred to:
Loh Wai Kong v. Government of Malaysia & Ors. [1978] 2 MLJ 175
Koon Hoi Chow v. Pretam Singh [1972] 1 MLJ 180
Ne Bee v. Chairman, Town Council, Kuala Pilah [1975] 1 MLJ 273
Chan Mun Poh v. Director-General of Telecommunications & Anor. [1981] 2 MLJ 293
Loh Wai Kong v. Government of Malaysia & Ors. [1978] 2 MLJ 180
San Development Co.'s Application [1971] 2 MLJ 254

Legislation referred to:
Constitution of the State of Kedah, art. 33B(1)
Islamic Family Enactment No. 1 of 1984 (Kedah), ss. 20(4), 23, 25, 108
Mahkamah Syariah Enactment 1981, ss. 21, (i)
Rules of the High Court 1980, O. 53 r. 1(1)
Specific Relief Act 1950, ss. 44, (1), (1)(a), (1)(d), 45

Other source referred to:
An Introduction to the Constitution of Malaysia, Tun Mohd. Suffian b. Hashim, 2nd Edn., p. 248

For the applicant - Ahmad Farid; M/s. Ahmad Farid & Co.
For the respondents - Y.B. Abdul Malik bin Haji Ishak, State Legal Advisor, Kedah

JUDGMENT

Mohd. Ariff Othman J:

This is an appeal against the decision of the High Court Alor Setar dismissing an application by one Mansor bin Mat Tahir, the applicant, for an order of *mandamus* under O. 53 of Rules of the High Court 1980, against the Kadi of Daerah Pendang, Kedah, as the 1st respondent and the Chief Registrar of Marriage, Divorce and Revocation, Kedah, as the 2nd respondent.

Facts of the Case

On 26 March 1987, the applicant applied for leave of the High Court pursuant to O. 53 r. 1(1) to apply for an order of *mandamus* against the 1st and 2nd respondents to order them to register a marriage between the applicant and one Normala binti Jusoh solemnized in Patani, Thailand, according to Muslim rites on 15 January 1986. In his application for leave to apply for an order of *mandamus*, the applicant stated the relief and the ground he sought for which read as follows:

The relief sought is:

(a) An order of *mandamus* to order the Kadi, the District of Pendang or Chief Registrar of Marriage, Divorce and Revocation to register the foreign marriage between the applicant, Mansor bin Mat Tahir and Normala binti Jusoh solemnized on 15 January 1986 in Patani, Thailand, according to Muslim rules.

(b) Such further and other reliefs as this Honorable Court deems fit.

The grounds upon which the said relief is sought are:

(a) Since returning to Malaysia the applicant and his wife has been forced to live separately by the family of the wife.

(b) The Kadi as the Ex-officio Registrar of Marriage, Divorce and Revocation in the District of Pendang has refused to register the marriage.

(c) The Kadi has refused to accept the application for registration made by the applicant pursuant to s. 23 of the Islamic Family Enactment 1979.

(d) The applicant will lose his conjugal rights to be with his lawfully wedded wife, if his marriage is not registered.

(e) The applicant has complied with all the requirements of s. 23 of the said Enactment.

In the affidavit accompanying his application for leave to apply an order of *mandamus*, the applicant stated *inter alia* the following:

I, Masor bin Mat Tahir (NRIC No. 7113904) of Kampung Bukit Raya Dalam, Mukim Bukit Raya, 06700 Pendang, Kedah do solemnly and sincerely affirmed say as follows:

1. I am the applicant abovenamed and domiciled in the State of Kedah, Malaysia.

2. The First respondent is the ex-officio Registrar of Marriage, Divorce and Revocation and the Second respondent is the Chief Registrar of Marriage, Divorce and Revocation appointed under s. 20 of the Islamic Family Enactment 1979 (hereinafter referred to as "the said Enactment").

3. On 15 January 1986 I and Normala binti Jusoh (NRIC No. A14555784) of Kampung Bukit Raya Dalam, Pendang, Kedah were married in Patani, Thailand according to Muslim rites. A copy of the marriage certificate issued by the Majlis Ugama Islam, Changwad, Patani, Thailand is now produced annexed herewith and marked as "M".

4. Upon my return to the State of Kedah, Malaysia, I immediately attended before the First respondent to register my marriage whereupon the First respondent instituted proceedings to have the said marriage validated *vide* Kes Mal (P) No. 2/1986.

5. Thereafter I went to get the advice of a solicitor at Messrs. Radzi Sheikh Ahmad, Noor & Farid, Alor Setar, with the aim of appointing the said solicitor to act for me. However the said solicitor advised me that under the said Enactment 1979, it was not necessary to institute proceedings in the Kadi's Court, but that I had to attend before the First respondent to register my marriage.

6. On 30 March 1986, my solicitors wrote to the First respondent explaining the position under s. 23 of the said Enactment and requesting that my marriage be registered. I personally handed the aforesaid letter to the Kadi's Office at Pendang and also produced my marriage certificate together with the duly filled form for registration of my marriage. A photo copy each of the aforesaid letter and the form are now produced and annexed herewith marked "M1" and "M2".

7. On 1 April 1986, my solicitors again wrote to the First respondent at Pendang requesting for withdrawal of the suit Kes Mal (P) No. 2/1986, and also enclosed therein photo copies of the marriage registration form and the marriage certificate.

8. By letter dated 27 April 1986, the First respondent at Pendang replied to the aforesaid letter informing my solicitors that he could not accept the application for registration of the marriage by virtue of s. 25(6) of the said Enactment. A photo copy of the said letter is now produced and annexed herewith marked "M3".

9. On 30 April 1986 my solicitors again wrote to the First respondent explaining the provision of s. 23 and 26 of the said Enactment. A photo copy of the said letter is now produced and annexed herewith marked "M4".

10. By a letter dated 13 May 1986 the first respondent again rejected the applicant's application for registration of the marriage. A photo copy of the said letter is now produced and annexed hereto marked "M5".

11. On 8 October 1986 when I went again before the First respondent at Pendang to enquire about the registration of my marriage, the First respondent advised me to file a fresh application under s. 23 of the said Enactment. Thereafter on 11 October 1986, I instructed my solicitors to write to the First respondent enclosing therein photo copies of the application form and the marriage certificate together with the filing fees therefore a photo copy of the said letter is now produced and annexed herewith marked "M6".

12. On 10 February 1987, I received a notice from the Registrar, Kadi's Court at Pendang informing me that the Court had fixed a hearing date on 26 February 1987 for the case registered as Kes Mal (P) No. 6/87 although no claim or summons was filled by me or my solicitors. A photo copy of the said noticed is now produced and annexed hereto marked "M7".

13. On 26 February 1987, I attended proceedings at the Kadi's Court at Pendang but no decision was made and subsequently it was adjourned to 21 July 1987.

14. I am now advised and verily believe that under s. 23 of the said Enactment, my marriage should be registered as of right.

15. Wherefore I pray for an Order in terms of the application herein.

In a joint affidavit in reply the 1st and 2nd respondents Sheikh Nek Ali bin Nek Ahmad, Kadi Daerah Pendang, Kedah and Dato' Sheikh Mohd Yusof bin Haji Ismail, Chief Registrar of Marriage, Divorce and Revocation, Kedah state, *inter alia:*

3. It has been read and explained to us a copy of the Affidavit of the applicant abovenamed affirmed on 29 June 1987.

4. We crave leave of this Honorable Court to refer to the Affidavit of the applicant abovenamed affirmed on 29 June 1987.

5. We admit paras. 1 and 2 of the applicant's Affidavit.

6. We are advised and verily believe that Normala bte. Jusoh, a Form 5 student of Sekolah Menegah Pendang, Kedah was kidnapped by the applicant on 14 January 1986 at 7.00 a.m. Jusoh bin Man, the father of Normala bte. Jusoh lodged a police report to this effect. A photostat of the certified true copy of the police report is annexed hereto and marked as "KDP 1".

7. We are advised and verily believe that Jusoh bin Man, the father of Normala bte. Jusoh was subsequently informed by the Senior Assistant teacher of Sekolah Menengah Pendang that his daughter (Normala bte. Jusoh) was absent from school for ten days without reason. A photostat copy of the letter from the Senior Assistant teacher in annexed hereto and marked as "KDP2". A photostat translation of the said letter by the sworn interpreter of the High Court is annexed hereto and marked as "KDP2A".

8. We admit para. 3 of the applicant's Affidavit but we are doubtful as to whether the marriage was solemnized in accordance to Hukum Syarak because the marriage was solemnized through Wali Wahkim. By Wali Wahkim we meant the bride can on her own accord appoint the Imam as her Wali Tahkim and on her own accord request the Imam to marry her to the man of her own choice. We are advised and verily believe that because Normala bte. Jusoh was kidnapped on 14 January 1986, she could not therefore have married the applicant willingly. We state that the marriage certificate referred therein contain a repudiatory clause enabling the Imam or

the province Islamic committee division to accept Normala's complaint when the parties do not live as husband and wife for more that six months (provided there's a witness to her complaint) and the marriage shall then be repudiated by one talak. And every time the applicant revert to Normala without her consent, she shall be repudiated by one talak. A photostat copy of the translation of the marriage certificate by the sworn interpreter of the High Court, Alor Setar is annexed hereto and marked as "KDP 3A".

9. We are advised and verily believe that the applicant and Normala bte. Jusoh did not live together as husband and wife after the marriage. In fact, Normala bte. Jusoh stayed with her father viz. Jusoh bin Man after the marriage for a period exceeding six months.

10. We admit para. 4 of the applicant's Affidavit and state that the **applicant had on 27 January 1986 applied** for registration of his marriage at the applicant's application, the First Kes Mal (P) 2/86 and fixed the case for hearing on 13 May 1986 in order to obtain further detail of the said marriage within meaning of s. 23(1)(b) of the Islamic Family Enactment 1979. This is solely because of the chequered history of the parties to the marriage in particular the fact that Normala bte. Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized.

11. We are advised and verily believe that the applicant through his Counsel Messrs. Radzi Sheikh Ahmad, Noor & Farid had on 1 April 1986 withdraw Kes Mal (P) 2/86. A First respondent's predecessor had on 27 April 1986 approved the withdrawal of Kes Mal (P) 2/86. A photostat copy of the letter dated 1 April 1986 from Messrs. Radzi Sheik Ahmad, Noor & Farid withdrawing Kes Mal (P) 2/86 is annexed hereto and marked as "KDP 4". [A photostat copy of the first respondent's predecessor's letter dated 27 April 1986 approving the withdrawal of Kes Mal (P) 2/86 is annexed hereto and marked as "KDP 5".]

12. We have no knowledge of para. 5 of the applicant's Affidavit.

13. We are advised and verily believe that on 5 September 1986 Normala bte. Jusoh obtained a divorce comprising of one talak from the applicant on the basis of her complaint of "Taklik" (repudiatory act) at the Kadi's office at the district of Chenak in the province of Senggora, Thailand. A photostat copy of the divorce certificate *vide* Vol. 24, number 1199 is annexed hereto and marked as "KDP 6A".

14. On 21 January 1987 armed with the divorce certificate Normala bte. Jusoh applied to the Kadi's Court at Pendang to confirm her divorce. Her application was duly registered as Kes Mal (P) 5/87. The First respondent fixed the date of hearing on 7 April 1987 at the Kadi's Court, Pendang. On the date of hearing (7 April 1987) the First respondent adjourned the matter till 28 July 1987 because of the High Court case [O.M. 32-09-87]. At that time leave was not granted to the applicant under O. 53 r. 1(1) of the Rules of the High Court 1980. To-date Kes Mal (P) 5/87 has been adjourned *sine die.*

15. On 5 February 1987 the applicant re-applied to register his marriage to Normala bte. Jusoh at the Kadi's Office at Pendang. The application was duly registered as Kes Mal (P) 6/87 and fixed for hearing by the Kadi's Court at Pendang on 26 February 1987 in order to obtain further detail of the said marriage within meaning of s. 23(1)(b) of the Islamic Family Enactment 1979. This is solely because of the chequered history of the parties to the marriage in particular the fact that Normala bte. Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized.

16. On 26 February 1987 the hearing of Kes Mal (P) 6/87 was conducted and was partly heard and adjourned for continued hearing on 21 July 1987.

17. On 7 April 1987 the applicant applied for adjournment of Kes Mal (P) 6/87 without assigning any reason thereto. The First respondent approved the application for an adjournment. [A photostat copy of the applicant's request for an adjournment of Kes Mal (P) 6/87 is annexed hereto and marked as "KDP 7". A photostat copy of the translation is annexed hereto and marked as "KDP 7A".]

18. We are advised and verily believe that this Honorable Court has no jurisdiction to adjudicate on this matter as this application relate to the Islamic religion (in particular registration of foreign marriage) pending before the Kadi's Court at Pendang. The Pendang Kadi's Court is capable of adjudicating Kes Mal (M) 6/876.

19. We are further advised and verily believe that in the event the applicant is unsuccessful in his attempt at registering the marriage at the Kadi's Court at Pendang (*vide* Kes Mal (P) 6/87 there is an available specific and adequate legal remedy for him viz. the right of appeal to the Court of Appeal as provided for under s. 108 of the Islamic Family Enactment 1979.

20. We are advised and verily believe that Kebawah Duli Yang Maha Mulia Tuanku Sultan Kedah Darulaman is the Head of Muslim Religion in the State and Majlis Ugama Islam Kedah constituted under the Administration of Muslim Law Enactment No. 9 of 1962 shall continue to aid and advise Kebawah Duli Yang Maha Mulia Tuanku Sultan Kedah Darulaman in matters relating to the Muslim Religion in the Sate.

21. We admit paras. 6, 7, 8, 9, 11 and 13 of the applicant's Affidavit.

22. Save that there was a letter dated 13 May 1986 by the First respondent's predecessor as stated in para. 10 the applicant's affidavit, we state that the applicant's matter *vide* Kes Mal (P) 6/87 is still pending and the hearing has been adjourned on the request of the applicant.

23. Save that Kes Mal (P) 6/87 was fixed for hearing on 26 February 1987, we have no knowledge of the assertions in para. 12 of the applicant's Affidavit.

24. In the interim period, Normala bte. Jusoh married her fiancee Osman bin Omar in the Mukim of Bena, District of Chenak, Province of Senggora, Thailand on 6 Rejab, 1407 Hijrah [equivalent to 6 March 1987] with RM3,684 as dowry in cash and expenses. Normala's marriage to Osman bin Omar, had the blessing of her father. Jusoh bin Man officiated as Wali Nikah (Marriage Guardian) in the marriage ceremony. A photostat copy of the marriage certificate between Normala bte Jusoh and Osman bin Omar *vide* Jilid 12 is annexed hereto and marked as KDP 8". A photostat copy of the translation of the marriage certificate by the sworn interpreter of the High Court Alor Setar *vide* Vol. 12 between Normala bte. Jusoh and Osman bin Omar is annexed hereto and marked as "KDP 8A".

25. We are advised and verily believe that on 27 May 1987 Osman bin Omar made an application at Kadi's Office, Pendang to register his marriage to Normala bte. Jusoh. The First respondent duly registered as Kes Mal 28/87. The date of hearing has yet to be fixed. A photostat copy of the letter dated 27 May 1987 from Osman bin Omar is annexed hereto and marked as "KDP 9".

26. We are advised and verily believe that Osman bin Omar and Normala bte. Jusoh lived happily as husband and wife till today. And that on 3 July 1987 Normala bte. Jusoh had a miscarriage while carrying the child of Osman bin Omar. We are further advised and verily believe that Normala bte. Jusoh is presently in her early state of pregnancy (also carrying the child of Osman bin Omar).

27. Save that Kes Mal (P) 2/86 was discontinued for hearing, we have no knowledge of the assertions in para. 14 of the applicant's Affidavit.

28. In regard to para. 15 of the applicant's Affidavit, we are advised and verily believe that Normala bte. Jusoh on her own accord decided to stay with her father on her return to Malaysia. And that by effluxion of time and by the events that transpired subsequently, she is currently the lawful wedded wife of Osman bin Omar.

29. In regard to para. 16 of the applicant's Affidavit, we are advised and verily believe that s. 23 of the Islamic Family Enactment 1979 do not confer registration of foreign marriage in Kedah as of fight but rather subject to the following conditions, viz. (a) that the foreign marriage validly contracted outside the State in Accordance to Hukum Syarak (b) that the Registrar is

satisfied that the marriage had been solemnized (c) that the parties are required to give any detail as required by the Registrar; and (d) that the parties had filled in the necessary forms as provided therein.

30. We pray that the applicant's application be dismissed with costs.

31. We also pray for such other relief or order as this Honorable Court may be pleased to make.

Leave to apply for an order of *mandamus* against both respondents having been granted by the High Court on 16 June 1987, the applicant thereafter proceeded to apply for the said Order by way of Originating Motion made on 26 March 1987.

In his further affidavit filed on 8 September 1987, the applicant states, *inter alia* as follows:

1. This affidavit is affirmed in amplification to my earlier affidavit affirmed on 25 March 1987.

2. It has been read and explained to me the contents of the affidavit of the First and Second respondents abovenamed affirmed on 24 August 1987 and filed herein (herein-after referred to as "as Affidavit In Reply")

3. I crave leave to refer to the Affidavit In Reply of the First and Second respondents.

4. (i) I deny para. 6 of the Affidavit In Reply alleging that I did on 14 January 1986 kidnap Normala bte. Jusoh. I wish to state that it was on Normala's suggestion that we elope to Patani, Thailand to get married. A photo copy of the letter from Normala to me is now produced and annexed hereto marked "MMT-1".

(ii) I further state that after my marriage to Normala, we stayed at a friend Jusoh's house at Patani for about 11 days whereat our marriage was consummated and thereafter Normala was pregnant. Upon our return Normala had an abortion.

(iii) I also wish to state that Normala had on her own free will followed me to Patani, and that she voluntarily consented to marry me. A photo copy of a letter sent to her family is now produced and annexed hereto marked "MMT-2".

(iv) Further I state that immediately upon our return, we surrendered ourselves to the Police at Pendang. There Normala was forcibly separated from me by her father and family although she strongly objected to the same.

(v) Since then Normala and I have been forced to live separately by her family.

5. I have no knowledge of para. 7 of the Affidavit In Reply.

6. As regards para. 8 of the Affidavit In Reply I state that my parents had on two (2) occasions approached Normala's family with a view to asking for her hand in marriage but her parents had on both occasions refused the same. I further state that because of her parents' refusal Normala and I decided to go to Thailand to get married by **Wali Tahkim.**

7. I deny para. 9 of the Affidavit In Reply and Repeat para. 4 above.

8. As regards para. 10 of the Affidavit In Reply I am advised and verily believe that there is no such provision under the Islamic Family Enactment 1979 for proceedings as instituted by the First respondent's predecessor. In fact the First respondent's predecessor turned down the application for registration of my marriage giving s. 25(6) as the reasons therefor.

9. I admit para. 11 of the Affidavit In Reply.

10. I have no knowledge of para. 13 and 14 of the Affidavit In Reply.

11. As regards paras. 15, 16, 17 and 22 of the Affidavit In Reply, I state that on 5 February 1987 the First respondent urged me to put in a fresh application for the registration of my marriage which I did. Subsequently I was informed that the said application was again registered but this time as Kes Mal (P) 6/87 and a hearing date was duly fixed on 26 February 1987 I was present in Court together with my Counsel who addressed the Court that it was not necessary for the case to be heard. The case was adjourned without any witnesses being called. On 7 April 1987 I again instructed my solicitors to write to the Court to withdraw the case. A photo copy of the letter dated 7 April 1987 is now produced and annexed hereto marked "MMT-3".

12. As regards paras. 18, 19 and 20 of the Affidavit In Reply I am advised and verily believe that I have no case pending in the Kadi's Court at Pendang.

13. As regards paras. 24 of the Affidavit In Reply I wish to state that upon being informed that Normala had remarried, I made a complaint to the Yang Di Pertua, Majlis Agama Islam Negeri Kedah about the said marriage. A photocopy of the said letter is now produced and annexed hereto marked "MMT-4".

14. I have no knowledge of paras. 25 and 26 of the Affidavit In Reply.

15. I deny para. 15 of the Affidavit In Reply and repeat para. 4 above.

16. I am advised and verily believe that under s. 23 of the Enactment my marriage to Normala should be registered as of right.

17. Wherefore I pray for an order in terms of the Application herein.

In their further affidavit filed on 9 September 1987 the 1st and 2nd respondents stated, *inter alia,* as follows:

3. It has been read and explained to us a copy of the Further Affidavit of the applicant above named affirmed on 7 September 1987.

4. We crave leave of this Honorable Court to refer to the Further Affidavit of the applicant above named affirmed on 7 September 1987.

5. In regard to para. 4(i) of the applicant's Further Affidavit, we deny that it was at Normala bte. Jusoh's suggestion that they (applicant and Normala bte. Jusoh) eloped to Patani. We are advised and verily believe that she was kidnapped by the applicant and forcibly taken to Patani and the undated letter referred therein was written by Normala bte. Jusoh under threat of death and that it was the applicant who forced her to write the said letter. In her own words (in the explanatory note) she said: "Saya juga telah di ugut, sekiranya saya tidak menulis surat ini saya akan di bunoh". A photostat copy of the said letter with Normala's explanatory note date 8 September 1987 is annexed hereto and marked as "CRI".

6. We deny para. 4(ii) of the applicant's Further Affidavit. We are advised and verily believe that the purported marriage between the applicant and Normala bte Jusoh in Patani was never consummated and therefore Normala was not pregnant. In consequence she never had an abortion upon her return to Pendang, Kedah.

7. In regard to para. 4(iii) of the applicant's Further Affidavit, we state that Normala bte. Jusoh was kidnapped and brought forcibly to Patani by the applicant and that she did not voluntarily consent to the marriage. We are advised and verily believe that the undated letter referred therein was written by Normala bte. Jusoh at Patani under threat of death. We have since verified the matter with her and it is now established that she was forced to write the said letter and in her own words (in the explanatory note dated 8 September 1987) she said succinctly: "Surat ini juga di tulis cara paksaan ... Saya juga telah di ugut, sekiranya says tidak menulis surat ini saya akan dibunoh". A photostat copy of the said letter with Normala's explanatory note dated 8 September 1987 is annexed hereto and marked as "CR2".

8. In regard to para. 4(iv) and 4(v) of the applicant's Further Affidavit, except that the parties surrendered themselves to the police at Pendang we deny that Normala was forcibly separated from the applicant by her father and family. We are advised and verily believe that Normala bte. Jusoh willingly followed her father and stayed with him (Jusoh bin Man) after the marriage for a period exceeding six months. We are further advised and verily believe that it was the desire of Normala bte. Jusoh not to live with the applicant as husband and wife.

9. We deny para. 6 of the applicant's Further Affidavit and repeat paras. 5, 6, 7 and 8 as stated above.

10. In regard to para. 8 of the applicant's Further Affidavit, we are advised and verily believe that it is the prerogative of the Registrar under s. 23(1)(b) of the Islamic Family Enactment 1979 to obtain further detail of the said marriage before registration in view of chequered history of the parties to the marriage. And this can only be effected by registering the matter as kes Mal (P) 2/86 as allowed under s. 21(i) of the Mahkamah Syariah Enactment 1983.

11. In regard to paras. 11 and 12 of the applicant's Further Affidavit, we state that Kes Mal (P) 2/87 was adjourned on the request of the applicant on 7 April 1987 and therefore the case is still pending before the Kadi's Court at Pendang, Kedah. In the circumstances, we are advised and verily believe that this Honorable Court has jurisdiction to adjudicate on this matter.

12. We admit receiving the letter from the applicant as stated in para. 13 of the applicant's Further Affidavit but state that the applicant is not entitled to express an opinion that "... walhal saya masih menjadi suaminya yang sah di sisi Syarak ..." because the matter (*vide* kes Mal (P) 87) is still pending at the Kadi's Court in Pendang.

13. In regard to para. 16 of the applicant's Further Affidavit, we repeat our assertions in para. 29 of our Affidavit In Reply affirmed on 24 August 1987.

14. We pray that the applicant's application be dismissed with cost.

15. We also pray for such other relief or order as this Honorable Court may be pleased to make.

On 12 September the application for order of *mandamus* to compell the 1st and 2nd respondents to register the foreign solemnized on 5 January 1986 was heard before me. In the course of the hearing the applicant Encik Ahmad Farid and the Hon'ble State Legal Adviser, Encik Abdul Malek bin Haji Ishak for the respondents respectively argued and submitted as follows:

Counsel for the applicant submits as follows:

The applicant contracted a marriage on 15 January 1988 with Normala bt. Jusoh. The marriage was solemnized in Patani, Thailand. They were married according to the Muslim rites. A Marriage Certificate was duly issued by the Majlis Ugama Islam, Changwad, Patani, Thailand. On their return to the State of Kedah, immediately the applicant went before the Pendang Kadi, the 1st defendant as the ex-officio Registrar of Marriage in the State of Kedah. The purpose is to register the marriage.

He filled the form for registration of Marriage and presented it before the 1st respondent together with the Marriage Certificate. Thereafter the respondent did not register the marriage but instituted a proceeding to have the marriage validated. This was *vide* Kes Mal (Civil Case) (P) No. 2 of 1986. Thereafter after seeking the advice of the solicitor the applicant withdrew the case. Subsequently the applicant was urged by the 1st respondent to file a fresh application for the Registration of Marriage which he did. Again the marriage was not registered but he instituted another proceeding and registered as Kes Map (Civil Case) (P) No. 6/87.

Again after getting the advice of his solicitor the applicant withdrew his application. In the meanwhile the application for registration of the marriage was refused by the 1st respondent until today it has not been registered.

1st respondent gave no sound reason apart from referring to s. 25(6) of the Islamic Family Enactment 1979. Applicant being aggrieved by the non-performance of the public duty of 1st respondent seek an Order for Mandamus to compel the 1st respondent to register the marriage.

The 2nd respondent was brought in by virtue of his being of Chief Registrar of Marriage, Divorce and Revocation in Kedah. [Counsel refers to s. 23 of the Enactment in issue.] Section 23 is in fact the provision for the registration of marriage solemnized outside the state by a domicile or resident of the state. [s. 23(1), (2) & (3).] The applicant's **contention is that s. 23 imposes a public duty on the Registrar to register the marriage as of right.** The requirement in (a), (b) and (c) in s. 23(1) are not conditions precedent to the performance of the duty of a Registrar. They merely say that if one or both of the parties attend before the Registrar, they merely need to produce the Marriage Certificate or any evidence oral or written of the marriage (in the absence of the Marriage Certificate). One or both of the parties need to apply in the form provided, i.e., there is a form provided in s. 23.

There is another requirement. This is to be satisfied upon request made by the Registrar, i.e., to gave any detail as required by the Registrar. The applicant has fulfilled the two requirements, i.e., he has produced Marriage Certificate. He has applied on the form provided.

The 3rd requirement was not asked for by the respondent. The Registrar of Marriage didn't ask for any detail. In the circumstance we submit that the Registrar should have registered the marriage upon obtaining the Marriage Certificate and form for the registration of the marriage. But the Registrar did not do this. He went on to request the applicant to institute proceeding against the Majlis to validate the marriage. This is not provided for by s. 23 of the Islamic Family Enactment. In the circumstance the Registrar was wrong in requesting that the applicant institute proceeding against the Majlis Ugama. [See also s. 26 of the Enactment, i.e., Islamic Family Enactment]. Section 23 only provides for the registration whether it is valid or otherwise is different matter altogether.

The respondent in his affidavit states that he is concerned with some other reasons for refusing to register the marriage. In his affidavit the 2nd respondent stated that "because Normala was kidnapped by applicant they refused to register the marriage". There was a police report lodged by the father of Normala. The girl was then 17 years when the marriage was solemnized.

First when the 1st respondent refused to register the marriage nothing whatsoever was mentioned about the kidnap, i.e., on 31 March 1986. The first time they refused the applicant's application was on 27 April 1986. The 2nd time was on 13 May 1986. **Both letters giving s. 25(6) of Enactment as the reason,** but no where was it mentioned in both letters that Normala was kidnapped as a reason. The report was lodged by the girls father on 14 January 1986 at Pendang Police Station *vide* Report No. 67/86.

The Registrar had been made aware of the kidnapping through the report lodged by her father on 14 January 1986. Section 25(6) is a provision for voluntary registration of Muslim marriage prior to this Enactment under any law. In this case s. 25(6) **is not relevant because it refers to registration of marriage prior to the coming into force of this Enactment.** Further the applicant when replying his 2nd defendant's affidavit deposed that Normala had consented and agreed to the marriage. The applicant produced two letters written by Normala. The 1st letter was sent to the applicant. This is to the effect, she is requesting the applicant to meet her at Tanah Merah, Pendang and also suggesting that they get married somewhere.

The 2nd letter was written by Normala herself but signed by the applicant and Normala after the marriage in Thailand. The letter was sent to both their parents.

After the marriage they both stayed in Thailand for about eleven (11) days. Upon their return they both surrendered themselves at Pendang Police Station. The girl's parents were informed. The father and the family forcibly took Normala away leaving the applicant in the police lock-up for one (1) day. There is no action taken by the police for kidnapping. The applicant had not been charged. The applicant had not kidnapped the girl. It was only a fictitious ground as an after thought. The two letters written by Normala [The 1st and 2nd respondents referred to the letters in their joint further affidavit in reply]. An explanation note was written by Normala on 8 September 1987 after the further affidavit was served on the respondent.

The note should be disregarded because it is improper for the respondent in their further affidavit to get a 3rd party (i.e., Normala herself) to write on the same letter long after she has written the very letter. She could not be called to be cross-examined. The proper procedure is to get her to affirm an affidavit and in which case she would be cross-examined. The note is purely hearsay.

The applicant was specially aggrieved by the non-performance of the 1st and 2nd respondent. He had an immediate interest in this matter. It is generally the rule that there must be specific demand to the respondent that he perform a duty imposed by him. The respondent here have unequivocally manifested his refusal to comply with that duty. The application was made twice to the 1st and 2nd defendant and on both occasions they were refused.

Section 23 of the Enactment provides for the performance of the duty by the respondent. Matter other than in s. 23 should not be taken into consideration. In the circumstances I humbly pray that the Court grant the Order of Mandamus as prayed for by the applicant.

Reply by the Hon'ble State Legal Adviser

This is an application for Order of Mandamus. Mandamus is specified in Specific Relief Act 1950 (Revised 1974/Act 137). Section 44 of the Act provides:

44 (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any Court subordinate to the High Court:

Provided that:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) Such doing or forebearing is, under any law for the time being in force, clearly incumbent on the person or Court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a Judge:

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

See proviso of s. 44(1) of the Specific Relief Act which are cumulative in effect. All the conditions must be fulfilled before the applicant can bring his case within the provision of the section.

See *Loh Wai Kong v. Government of Malaysia & Ors.* [1978] 2 MLJ p. 175. See also p. 176 (Left hand column I).

See also case of *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ p. 180, see p. 181 para. C (Right hand column).

See also *Ng Bee v. Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ p. 273, see also p. 275 (left hand column para. 3, E/F). The similar principles are in compliance with the proviso to s. (1) of s. 44 of the Specific Relief Act. Mandamus is discretionary in nature. See *Ng Bee's* case p. 275 see left hand column, 2nd para, line D.

Being discretionary the order of *mandamus* should not have been applied for the following reasons.

(1) Section 45 of the Specific Relief Act lays down the principle to be adopted in an affidavit accompany the application before the Court.

The matter has been decided upon by Mr. Justice Ajaib Singh (p. 275, left hand column, 2nd para.)

In this application as could be seen from the applicant's affidavit (affirmed on 29 June 1987) s. 45 of the Specific Relief Act is not stated. The three requirements are cumulative in effect as stated by Mr. Justice Ajaib Singh. In the affidavit of the applicant (the closest in the affidavit to s. 45 is para. 15 of the s. 45 is talking about rights in the matter in question ("conjugal" is not a right in the matter in question). The rights are not particularly specified in the affidavit of the applicant instead they are to be implied by the Court.

One of the provisos to s. 44(1) of the Specific Relief Act was not complied with. Under s. 44(1)(d) it provides that: the applicant had no other specific and adequate legal remedy. From the affidavit on 24 August 1987, in particular p. 6 of the affidavit in reply, para. 19 at the top.

> We are further advised and verily believe that in the event the applicant is unsuccessful in his attempt at registering the marriage at the Kadi's Court at Pendang (*vide* Kes Mal (P) 6/87) there is an available specific and adequate legal remedy for him viz, the right of appeal to the Court of Appeal as provided for under s. 108 of the Islamic Family Enactment 1979.

In other words there is an available remedy to the applicant if the case is set aside by the respondent, it is by way of an appeal to the Court of Appeal as provided by the Islamic Family Enactment 1979. [See s. 108.] Since there is a specific and adequate remedy available to the applicant Mandamus should not be granted to the applicant.

Chan Mun Poh v. Director-General of Telecommunications & Anor. [1981 2 MLJ p. 293 (See p. 294 left hand column 2nd para.)

He should have addressed his case to the Court of Appeal instead as provided by s. 108 of the Islamic Family Enactment 1979. The Mandamus sought for should not be given pursuant to *Loh Wai Kong v. Government of Malaysia & Ors.* [1978] 2 MLJ p. 180, [right hand column both B & C.] Relying on "whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent.

a See para. G/H (right hand column).

Section 23 of the Islamic Family Enactment has two limbs.

> 1st limb 23(1) If a person domiciled or resident in this State validly contracts a marriage outside the State in accordance to Hukum Syarak and that marriage is not a marriage registrable under the provision of s. 18, he shall within six months after the marriage attend before the nearest Registrar appointed under s. 29(4) or before the Registrar who is most readily available in the foreign country to register his marriage and on registration it shall be deemed a marriage registered under this Enactment unless the Registrar is not available or if before the expiry of the six months one or both the parties of the marriage returns to this State without registering the marriage in that country any one or both the parties shall attend before the Registrar in this State:
>
> (a) to produce before the Registrar a marriage certificate or any evidence oral or written to satisfy the Registrar that the marriage had been solemnized;
>
> (b) to give any detail as required by the Registrar for the registration thereof; and
>
> (c) to apply in the form provided for the registration of the marriage so solemnized.

b *c* *d* Both parties resident or domiciled in a State of Kedah and not in another state. They must within 6 months applying for registration which is necessary under the Enactment.

2nd Limb

Under the regulation within the 6 months the applicant can come to any Registrar and produced a Marriage Certificate and any evidence oral or written that the marriage has been solemnized. In giving details (a), (b) and (c) are conjunctive.

e *f* *g* Counsel for the applicant stated that the Kadi didn't have to register the application. Any evidence oral or written that the marriage has been solemnized must be supplied. The Registrar registered it as Kes Mal No. 2(86). Then in Kes Mal No. 6(7). (See affidavit in reply of the respondent dated 24 August 1987. See p. 3 para. 10). "We admit para. 4 of the applicant's affidavit and state that the **applicant had on 27 January 1986 applied** for registration of his marriage at the First respondent's office. On receipt of the applicant's application, the First respondent's predecessor duly registered it as Kes Mal (P) 2/86 and fixed the case of hearing on 13 May 1986 in order to obtain further detail of the said marriage within meaning of s. 23(1)(b) of the Islamic Family Enactment 1979. This is solely because of the chequered history of the parties to the marriage in particular of the fact that Normala bte. Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized." [See p. 4 para. 10]. [See p. 5 para. 15]. See further affidavit in reply on 9 September 1987 by the respondent in particular p. 3 para. 10. See Mahkamah Syariah Enactment 1983 s. 21. I submit that s. 23 of the Islamic Family Enactment read together with 21(i) of the Mahkamah Syariah Enactment 1983 makes it imperative to register the case as Kes Mal.

h Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent. I would only refer to s. 23(1) of the Islamic Family Enactment. In particular 23(1)(a).

> (a) is to satisfy the Registrar that the marriage has been solemnized. (a requirement of satisfying would involve discretion. Since it involves discretion on the strength of *Loh Wai Kong v. Government of Malaysia & Ors.* Mandamus should not that be granted to the applicant. Apart from it also involves a question of judgment on the part of the Registrar of Marriage. Judgment would in compliance with s. 23(1)(a), namely any evidence oral or written. This is to be read with (b), i.e., to give any detail as required by the Registrar. Because of the words in 23(1)(a)

i

and (b) judgment comes into the picture and when judgment is involved, "Mandamus should not be given.

It was submitted by Counsel for the applicant s. 23(1)(b) does not apply because the Registrar didn't ask any detail from the applicant. In answer I would like to refer to the affidavit of the applicant that was affirmed on 29 June 1987. In the applicant's affidavit they referred to Exh. "M7" para. (2) "Dengan ini kamu dikehendaki hadir sendiri atau dengan wakil kamu pada hari, masa dan tempat yang tersebut di atas serta bawa dua orang saksi bersama-sama keterangan yang hendak dibentangkan di dalam Mahkamah ini". This is an implication in telling that the Registrar required the detail in s. 23(1)(b).

On the point of *mandamus*. It is submitted that in *Re San Development Co.'s Application* [1971] 2 MLJ p. 245, see p. 256 (left hand column para. "G") is relevant. In the event that mandamus lie the Court can't direct the Registrar or the 1st respondent how and in what manner he is to perform his duty. By mandamus the Court can only direct the Registrar to perform his duty. In this matter the duty is to register the foreign marriage. The Court can only ask him to do his duty and no more. The Court can't direct the Registrar to perform it in a particular way.

Jurisdiction of the Court

It is my submission that Islamic Law being a personal law the High Court *prima facie* does not have jurisdiction to exercise the powers of the Syariah Court. Only Muslim Courts established by state authorities has jurisdiction over Muslims. [See Tun Mohd. Suffian bin Hashim, *"An Introduction to The Constitution of Malaysia"* 2nd Edn., p. 248, paragraph under headings "Islam A State Subject"and "Muslim Courts"].

High Court has no jurisdiction. The Islamic Law is a personal law the High Court *prima facie* does not have jurisdiction to have the powers of the Syariah Court. Only Syariah Court established by the state authorities have jurisdiction over the Muslims. On this point see.

Tun Mohd. Suffian b. Hashim *"An Introduction To The Constitution Of Malaysia"*, 2nd Edn., See p. 248 under "Muslim Courts". According to Tun Suffian, "Of significance is the qualification that Muslim Courts established by state authorities have jurisdiction only over Muslims and have no jurisdiction in respect of offences except in so far as conferred by federal law".

In this case the parties are Muslims, the right forum is the Syariah Court. On the basis of the affidavit of the respondent it is clear the case before the Kadi had not been disposed. In fact it is part heard.

Secondly the Ninth Schedule of the Federal Constitution. Federal List I, item 4(e).

State List II

Only matters falling under List I, para. 4(e) of the Ninth Schedule and List II of the State List para. 1 spell out the Muslim matters on which the state have jurisdiction. Islamic law is under the prerogative of Tuanku and this is so by virtue of the Constitution of Kedah, Art. 33B(1), State Constitution of Kedah.

Jurisdiction

Conjugal rights is a matter on which the High Court has no jurisdiction to adjudicate upon.

To determine whether or not an order of *mandamus* should issue against both the respondents to compel them to register the applicant's marriage to Normala bte. Jusoh, the

legal position pertaining to a number of aspects relevant to the application including the law relating to the powers and jurisdiction of the Court before which the application for the order of *mandamus* is made as well as the jurisdiction and powers of the authorities against which the order of *mandamus* is to be issued, must be considered.

Order 53 of the Rules of the High Court 1980 spells out in detail the provisions pertaining to the conditions, time, and mode of applying for an order of *mandamus*. At the outset procedural wise, it would seem, that the applicant was on the right track when he made the application to this Court for an order of *mandamus* to issue against the 1st and 2nd respondents to compell them to register the applicant's marriage to Normala bte. Jusoh. However, before considering the question of the jurisdiction of this Court to entertain the application, it is proposed to consider first the relevant provisions of the law under which the 1st and 2nd respondents were supposed to comply with, and thereby act upon the application made by the applicant for the alleged none compliance with which the application for an Order of Mandamus was made against them. The law in question is s. 23 of the Kedah Islamic Family Enactment No. 1 of 1984 which provides as follows:

> 23.(1) If a person domiciled or resident in this State validly contracts a marriage outside the State in accordance to Hukum Syarak and that marriage is not a marriage registerable under the provision of s. 18, he shall within six months after the marriage attend before the nearest Registrar appointed under s. 29(4) or before the Registrar who is most readily available in the foreign country to register his marriage and on registration it shall be deemed a marriage registered under this Enactment unless the Registrar is not available or if before the expiry of the six months one or both the parties of the marriage returns to this State without registering the marriage in that country any one or both the parties shall attend before any Registrar in this State:
>
> (a) to produce before the Registrar a marriage certificate or any evidence oral or written to satisfy the Registrar that the marriage had been solemnized;
>
> (b) to give any detail as required by the Registrar for the registration thereof; and
>
> (c) to apply in the form provided for the registration of the marriage so solemnized.
>
> (2) The Registrar may exempt the attendance of one of the parties to the marriage if he is satisfied that there are adequate and valid grounds that prevented him from attending and in such circumstances in the District Register shall be entered a record the reason why the person is absent.
>
> (3) Soon after the registration of the marriage is made under this section and on payment of the fees prescribed the Registrar shall:
>
> (a) issue a Certificate in the form provided to both parties to the marriage; and
>
> (b) forward a copy of the entry made in the District Register to the Chief Registrar who shall enter the entry in the Central Register.
>
> (4) If the parties to the marriage required to be registered do not make an application for registration within the time prescribed by sub-section (1), the marriage may, on application to the Registrar and after payment of a penalty prescribed be registered.

Section 23 of the Islamic Family Enactment therefore confers on the persons domiciled or resident in the State of Kedah who have contracted a valid marriage outside the State in accordance with Hukum Syarak, the right within six months after the marriage to attend before the nearest Registrar appointed under s. 20(4), or before the Registrar who is most readily available in the foreign country, to register his marriage, and on registration the marriage shall be deemed a marriage register under this Enactment. Alternatively in the event that the

Registrar is not available or before the expiry of the six months one or both the parties of the marriage returns to the State without registering the marriage in that country, any one or both the parties shall attend before the Registrar in the State and; (a) produce before the Registrar a marriage certificate or any evidence oral or written to satisfy the Registrar that the marriage had been solemnized; (b) give any details as required by the Registrar for registration of the marriage and (c) to apply in the form provided for the registration of the marriage so solemnized.

In this particular case, the applicant had resorted to the alternative procedure provided under s. 23 in order to get this marriage solemnized in Patani, Thailand registered by the respondents. There is no doubt that the applicant had complied with requirement under Clause (a), i.e., produce before the Registrar, the respondent, a marriage certificate that should have **satisfied** the respondent that the marriage had been solemnized. There is no doubt also that the applicant had applied for registration of his marriage in the form provided under Clause (c). However, the Registrar is also entitled to require the affidavit if he so wishes, to give any detail as he required under Clause (b). Assuming that all the prerequisites having been complied with by the applicant, and barring any untoward incident or circumstances, there is no reason why the Registrar should not register the marriage and issue the certificate in the form provided to both parties to the marriage as well as forward a copy of the entry made in the District Register to the Chief Registrar who should enter the entry in the Central Register under s. 23(3).

Be that as it may, whether or not the Registrar, or the Chief Registrar i.e., the respondents in this case should or should not register the applicant's marriage depends very much on whatever information he might have obtained from the available sources. I would say the Registrar in this case both the respondents are not bound, as a matter of course, to register the marriage if their investigation revealed that this is not a case in which they should act to register the marriage in compliance with s. 23 of the Islamic Family Enactment 1979. In other words the registration of the marriage at the instance of the applicant is not a matter of automatic right. A lot depends on the discretion of the Registrar or the respondents in this case, the exercise of which depends very much on whatever information available to them as he is entitled to require the applicant to give any details which he may require before taking any action to register the marriage. It would not be wrong to suggest that if the Registrar is not fully satisfied, and in this case, the respondents if they are not satisfied that this is a case which would warrant the marriage to be registered, they have every right to refuse to register the marriage. Indeed they did not act immediately to register the marriage or wrongly giving s. 25(6) of the Islamic Family Enactment as the reason for not doing so. Section 25(6) of this Act provides:

> (6) A Registrar shall not register any marriage under this section if he is satisfied that the marriage is not recognised under the provisions of this Enactment.

This is only in respect of voluntary registration of Muslim marriage prior to this Enactment under any law and is therefore irrelevant for the purpose of registering of marriage under this Enactment. Be that as it may any person aggrieved by any decision of any Court should first exhaust the remedy available under the law itself, i.e., the Islamic Family Enactment 1979 since under s. 108:

> Any person aggrieved by any decision of any Court, Kadi or Registrar may appeal to the Court of Appeal and in accordance with the procedures provided by law relating to civil and criminal proceedings.

However, before considering whether this is a case in which the applicant should resort to the Court of Appeal as an aggrieved party, it is worth the while to examine the grounds and the circumstances resulting in the applicant's marriage not as yet being registered by the respondents. For this it is necessary to examine briefly the outline of the historical background leading to the application for an order of *mandamus* made by the applicant.

It may be recalled that the applicant's Counsel had purported to simplify his client's case by arguing that this is simply a matter in which both the respondents had been indolent in refusing to register the applicant's marriage when they were duty bound to do so under s. 23 of the Islamic Family Enactment 1979 and as such the Counsel for the applicant had taken up this originating motion to compell both respondents to register the applicant's marriage to Normala bte. Jusoh by way of the order of *mandamus* through this Court. But this is not such a simple case as the Counsel for the applicant had tried to make it. There is more to it than meets the eye.

In the first place, there is a question of the provisions of clauses (a), (b) and (c) to s. 23(1) of the Islamic Family Enactment 1979, particularly the prerequisites spelt out in Clause (b) to that section which requires any one or both the parties to give any details as required by the Registrar for the purpose of registration. If it turns out that the details given are insufficient or any detail being supplied are not as required or do not satisfy the Registrar, obviously he is not bound to register the marriage. As such it cannot be said that the Registrar is duty bound at all costs to register the marriage despite the lack of any necessary information, as required under Clause (b). That being the state of affairs it cannot also be said that to get the foreign marriage registered by the Registrar is a matter of unequivocal or inherent right not to be denied (an undeniable right) to the applicant by the Registrar, and that the Registrar must act automatically to have the marriage registered irrespective of the circumstances he found himself in or confronted with, when the application was made.

To ascertain the reasons or the grounds behind his refusal or reluctance to register the applicant's marriage to Normala bte. Jusoh, the circumstances which both respondents found themselves confronted with need therefore to be considered. It all started, it may be recalled, the applicant, Mansor bin Mat Tahir and the girl were desirous of contracting a marriage without a blessing of the girl's parents because by way of affidavit filed on 8 September 1987 the applicant eventually admitted under Clause 4(i) of his further affidavit "..that it was on Normala's suggestion that we elope to Patani, Thailand to get married." [See photocopy of the letter from Normala bte. Jusoh to the applicant produced and annexed and marked as "MMT-1"]. In para. 6 of the same Affidavit, the applicant had also stated that "... my parents had no two (2) occasions approached Normala's family with the view to asking for her hand in marriage but her parents had on both occasions refused the same. I further state that because of her parents' refusal Normala and I decided to go to Thailand to get married by **wali tahkim.** This therefore confirms the fact that in the first place the marriage of the applicant to Normala did not start on healthy basis in view of the latter's parents lack of blessing of the girl's parents. When a marriage is contracted by way of **"wali tahkim"** which means, as explained in Clause 8 of the respondents joint affidavit in Reply filed on 24 August 1987, "... the bride can on her own accord appoint the Imam as her wali takhim and on her own accord request the Imam to marry her to the man of her own choice." The bride's consent whether or not they were voluntarily and willingly given, becomes a pertinent issue. Since the applicant's marriage took place in Patani, Thailand, against the wishes of the girl's parents should give the respondents strong case to doubt whether the girl had willingly given her consent to marry the applicant, even though the applicant had produced a marriage certificate issued by the Majlis Ugama Islam Changwad, Patani, Thailand. Indeed both the respondents

had strong reasons to doubt whether the marriage was solemnized in accordance with Hukum Syarak to **"wali tahkim"** on being "advised and verily believed that Normala bte. Jusoh, a Form Five student of Sekolah Menengah Pendang, Kedah was kidnapped by the applicant on 14 January 1986 at 7.00 a.m and Jusoh bin Man, the father of the girl had lodged a police report to this effect (a photostat of the certified true copy of the police is annexed and marked "KDP 1" to the respondent's Joint Affidavit). The fact that Jusoh bin Man, Normala's father was subsequently informed by the Senior Assistant Teacher of Sekolah Menengah Pendang that his daughter was absent from school for 10 days without reason tended to arouse further the respondents' suspicion and to make them to doubt whether the so called marriage solemnized through "wali tahkim" was validly solemnized. [See photostat translation of the letter by the sworn interpreter of the High Court annexed as "KDP 2A"].

Though there was a marriage certificate of the foreign marriage which have been tendered by the applicant pursuant to s. 23(1)(a) when he applied for the registration of his foreign marriage to Normala bte. Jusoh, it has been contended by both the respondents that "the marriage certificate referred therein contained a repudiatory clause namely, "the Imam of the Province Islamic Committee Division to accept Normala's complaint when the parties do not live as husband and wife for more than 6 months (provided there is a witness to complaint) and the marriage shall then be repudiated by one Talak". And every time the applicant revert to Normala without her consent, she shall be repudiated by one Talak, [See a photostat copy of the marriage certificate annexed as "KDP 3", and translation of the marriage certificate by the sworn interpreter of the High Court Alor Setar annexed and marked as "KDP 3A"]. The fact that they did not live as husband and wife together after their foreign marriage and that the latter stayed with her father for a period exceeding 6 months would be a strong cause for the repudiatory clause, a condition attached to their marriage, to operate.

Nevertheless it may be recalled that both respondents admitted in their joint affidavit, para. 4 of the applicant's Affidavit accompanying the application for leave to apply an order of *mandamus* in which the applicant stated that upon his return to the State of Kedah, Malaysia the applicant immediately attended before the 1st respondent to register his marriage whereupon the 1st respondent instituted proceedings to have the said marriage validated *via* Kes Mal (P) 2/1986. The application to have the marriage registered and was told by the 1st respondents as Kes Mal (P) 2/86 and fixed the case for hearing on 13 May 1996 in order to obtain further detail of the said marriage within the meaning of s. 23(1)(b) of the Islamic Family Enactment 1979. It was further stated in Clause 10 of the respondents joint affidavit that "This is solely because of the chequered history of the parties to the marriage, in particular the fact that Normala bte. Jusoh was kidnapped by the applicant on 14 January 1986 before the marriage was solemnized.

The event that followed thereafter was that the applicant through his Counsel Messrs. Radzi Sheikh Ahmad, Noor and Farid withdrew Kes Mal (P) 2/86 on the 1 April 1986 and the 1st respondent predecessor approved the withdrawal on 27 April 1986 (photostat copy of letter dated 1 April 1986 from Messrs. Radzi Sheikh Ahmad, Noor and Farid withdrawing Kes Mal (P) 2/86 is annexed as 1st respondent precedessor approving the withdrawal of Kes Mal (P) 2/86 annexed as "KDP 5").

To complicate the matter further both respondents had stated in para. 13 of the joint affidavit that they had been" advised and veribly believed that on 5 September 1986 Normala bte. Jusoh had obtained a divorce of one Talak from applicant on the basis of her complaint of "Taklik" (repudiatory act) at the Kadi's office at the District of Chenak in the province of Thailand. (A photostat copy of the divorce certificate *vide* Vol. 24 No. 1199 annexed as "KDP 6" a photostat translation of a divorce certificate is annexed and marked as "KDP 6A".)

Paragraph 14 of the respondents joint affidavit stated that "on 21 January 1987 armed with the divorce certificate Normala bte. Jusoh applied to the Kadi's Court at Pendang to confirm her divorce. Her application was duly registered as Kes Mal (P) 5/87." The 1st respondent fixed the date of hearing on 7 April 1987 at the Kadi's Court Pendang. On the date of hearing 7 April 1987 the 1st respondent adjourned the matter till 28 August 1987 because of the High Court case OM. 32-09-87. At that time leave was not yet granted to the applicant under O. 53 r. 1(1) of the Rules of the High Court 1980. To date case Mal (P) 5/87 has been adjourned *sine die.*

The event that transpired thereafter, according to para. 15 of the hint affidavit of both respondents states that on 5 January 1987 the applicant reapplied to register his marriage at the Kadi's Office at Pendang. The applicant's application was duly registered and fixed before Kadi's at Pendang on 26 January 1987. In order to obtain further detail of the said marriage within the meaning of s. 23(1)(b) of the Islamic Family Enactment 1979. The reason stated for this exercise is solely because the chequered history of the parties to the marriage in particular the fact that Normala bte. Jusoh was alleged to be kidnapped on 14 January 1986 before the marriage was solemnized as stated earlier. On 26 February 1987 the hearing of Kes Mal (P) 6/87 was conducted and was partly heard and adjourned for continued hearing on 21 July 1987. But on 7 April 1987 the applicant without assigning any reason applied for the adjournment of the case. The 1st respondent approved the case for adjournment [a photostat copy of the request of Kes Mal (P) 6/87 is annexed as "KDP 7" and a photostat copy of the translation is annexed as "KDP 7A" to the respondents joint affidavit.

As a matter of fact the applicant's matter *vide* **Kes Mal (P) 6/87** is still pending and that the hearing has been adjourned on the request of the applicant himself. As such the outcome of the hearing of applicant's application for the registration of his marriage to Normala bte. Jusoh has yet to be determined by the 1st respondent. It would not be an over statement to say that at this juncture it is still premature for the applicant to seek for a remedy in the High Court by way of order of *mandamus* because it would appear that this is not a case in which both the respondents had utterly and absolutely refused to register the applicant's marriage but because they had strong reasons for not rushing into the matter, particularly having regard to the fact that the matter had been made further complicated by the fact that in the meanwhile "Normala bte. Jusoh had married her fiancee, Osman bin Omar, in the Mukim of Menan, Province of Sengora, Thailand on 6 Rejab 1407 Hijrah (equivalent to 6 March 1987) with RM3,684 as dowry in cash and expenses, the 2nd Marriage to Osman bin Omar. According to para. (iv) of 24 of the respondents joint affidavit she had the blessing of her father, Jusoh bin Man who officiated as "wali nikah" (married guardian) in the marriage ceremony". (A photostat copy of the marriage certificate to Normala bte. Jusoh and Osman bin Omar *vide* Jilid 12 is annexed as "KDP 8".) (A photostat copy of the translation of the marriage certificate by the sworn interpreter of High Court Alor Setar is annexed as "KDP 8A".)

According to para. 25 of the respondent joint affidavit they have been advised and verily believe that on 27 May 1987 Osman bin Omar made an application at Kadi's Office Pendang to register his marriage to Normala bte. Jusoh. The application was registered by the 1st respondent as Kes Mal (P) 28/87. The date of the hearing as yet to be fixed (a photostat copy of the letter dated 27 May 1987 from Osman bin Omar is annexed as "KDP 9").

To make matter ever more complicated than ever, we have para. 26 of both the respondents joint affidavit stating that "we are advised and verily believe that Osman bin Omar and Normala bte. Jusoh lived happily as husband and wife till today. And that on 3 July 1987 Normala bte. Jusoh had a miscarriage while carrying the child of Osman bin Omar. We are

further advised and verily believe that Normala bte. Jusoh is presently in the early state of pregnancy" i.e., carrying a child by Osman bin Omar. According to para. 28 of the respondents joint affidavit they have been "advised and verily believed that Normala bte. Jusoh on her own accord decided to stay with her father on her return to Malaysia and that by a fluxion of time and by the event that transpired subsequently she is currently the lawful wife of Osman bin Omar."

Presented with circumstances of the chequered and dubious history of the applicant's marriage alleged to have been contracted by the applicant in a foreign country followed by events, some of which admittedly are beyond the control of the applicant, Mansor bin Md. Tahir and also those concerned with the application for the registration of the marriage, namely the 1st and the 2nd respondents, any question of law apart, it is not surprising that both respondents had not as yet registered the applicant's foreign marriage to Normala for reasons it seems that both the respondents can be said to be entirely at fault.

It could be that both respondents were in the wrong in the first place in not having registered the applicant's marriage to Normala when the application was before them. If the respondents were truly wrong the question is, has the aggrieved party any remedy, if so under which law. Apparently s. 108 of the Islamic Family Enactment 1979 provides that "Any person aggrieved by any decision of any Court Kadi or Registrar may appeal to the court of Appeal." Since an internal or local remedy is still available under the Islamic Family Enactment 1979 and has not been exhausted the aggrieved party, in this case, the applicant should have in the first place exhausted the remedy available under the Enactment, and appeal against the decision of the respondents to the Court of Appeal in accordance with the procedure provided by law relating to civil and criminal proceedings. Since no decision as yet has been made by the respondents because Kes Mal (P) 6/87 is still pending because the hearing had been adjourned on the request of the applicant it cannot be said that there has been a decision made by the respondent not to the applicant's liking for which an appeal lies to the Court of Appeal at the instance of an aggrieved party or parties.

I now wish to turn to the point of law and the provisions of law relevant to this case, other than s. 23 of the Islamic Family Enactment, the spirit, object and content of which I have discussed at some length earlier. Section 44 of the Specific Relief Act 1950 (Revised 1974/ Act 137) seems to empower a Judge to make an order requiring any specific act to be done or forborne by any person holding a public office whether of a permanent or a temporary nature, or by corporation or any Court subordinate to High Court, [provided the proviso to that section have been complied with,] **among which,** include the fact that the application for such an order has been made by person whose personal right, *inter alia*, would be injured by the forbearing or doing of the said specific Act, the applicant has no other specific and adequate remedy, and the order applied for will be complete. Apparently, according to *Loh Wai Kong v. Government of Malaysia & Ors.* [1978] 2 MLJ p. 175, the five conditions contained in the proviso of s. (1) of s. 44 of the Specific Relief Act 1950 which are cummulative must be fulfilled before the applicant can succeed in bringing this case within the purview of (See also *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ p. 181 and also *Ng Bee v. Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ p. 273 and p. 275. "Section 45 of the Specific Relief Act 1950 sets out the procedure to be adopted in an application under s. 44(1) of the Act. The application must be accompanied by an affidavit of the person injured stating his right in the matter in question demanding the justice and the denial thereof. The High Court's power to make an Order compelling a public officer to perform his duty is discretionary. Before the Court may consider exercising its discretion in favour of granting Order, it must be satisfied that the applicant has a right to the performance of a duty under

any law by a person holding a public office. The Court must also be satisfied that all the conditions laid down in the provisos to s. 44(1) of the Specific Relief Act are fulfilled" (per Ajaib Singh J).

It is contented for the respondents that the closest to the requirement of s. 45 of the Specific Relief Act, is para. 15 of the applicant's affidavit affirmed on 29 June 1987. But argued, the Honorable State Legal Adviser for both the respondents that **conjugal right** is not a right in the matter in question. Another words, i.e., the registration of the applicant's marriage to Normala bte. Jusoh is not a personal right within the preview of s. 44(1)(a) of the Specific Relief Act 1950, though the right to be with his lawfully wedded wife is a conjugal right personal to the applicant.

The other requirement of s. 44(1)(d) is that the applicant has no other specific and adequate legal remedy. But from the respondents affidavit in reply affirmed on 24 August 1987, it has been contended at para. 19, p. 6 thus:

> 19. We are further advised and verily believed that in the event the applicant is unsuccessful in his attempt at registering the marriage at the Kadi's Court at Pendang (*vide* Kes Mal (P) 6/87) there is an available specific right of appeal to the Court of Appeal as provided for under s. 108 of the Islamic Family Enactment 1979". Since there is a specific and adequate remedy available to the applicant when marriage should not be granted to him, *Chan Mun Poy v. Director-General of Telecommunications & Anor.* [1981] 2 MLJ p. 293 in which Wan Sulaiman FJ as he then was stated *inter alia:*
>
> > Apart from anything else, he could, if what he alleges is true have his remedy in an action for mutual contract I would therefore not be able to assert that he has "no other specific and adequate remedy" a condition necessary to entitle a person to apply for relief under s. 44(1) of the Act. Similarly
> >
> > any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by machinery of which an order under s. 44 of the Specific Relief Ordinance. Mandamus does lie to enforce a civil liability arising out of a breach of contract based on contract. A civil suit for damages or for enforcement of a civil ability may be the proper remedy in such a case. per Sharma J in *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ p. 180.

It was also argued for both respondents following the Sharma J (as he was in *Koon Hoi Chow v. Pretam Singh)* that there are two more prerequisites essential to the issue of an order under s. 44 of the Specific Relief Act, namely:

(i) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(ii) whether the applicant has any remedy other than by way of *mandamus*, for the enforcement of the right which has been denied to him.

Since this is not such case in which the respondents duty is of an imperative ministerial character involving no judgment or discretion on the part on the respondents, *mandamus* ought not to be given.

For the applicant it was argued by his Counsel that s. 23(1)(b) of the Islamic Family Enactment does not apply because the respondents did not ask for any detail from the applicant. In reply the Hon'ble State Legal Adviser referred to Exh. MM7 para. 2 annexed to the applicant's affidavit affirmed on 29 June which states:

> Dengan ini kamu dikehendaki menghadirkan diri pada masa dan tempat yang tersebut di atas sereta membawa dua orang saksi bersama-sama keterangan yang dibentang di dalam Mahkamah ini.

For the respondent it was argued that by way of an implication the respondent required the detail under s. 32(1)(b).

Turning to the question of jurisdiction it is argued for the respondents that Islamic Law being a personal law *prima facie* the High Court does not have jurisdiction to exercise the power of the Syariah Court. Only Muslim Courts established by State Authority have jurisdiction over Muslims. Reference was made to "*An Introduction To The Constitution of Malaysia*, 2nd Edn., p. 248" by Tun Mohd. Suffian bin Hashim under the heading "Islam A State Subject" which means that only State has legislative and executive authority over it. The Federal Government has not (except in the Federal Territory). The State List, which enable matters in respect of which a State Legislature has power to make law, spells out the Muslims matter over which a State has jurisdiction. These are some of the matters:

Muslim law and personal and family law for Muslims, ... Muslim Court ... the determination of matters of Muslim law. As such it was further argued for the respondents that the High Court does not have jurisdiction, Islamic law is a personal and the High Court does not have any jurisdiction nor the power of the Syariah Court. Only Syariah Court established by the State Authority over the Muslim. To enforce this argument the Hon'ble State Legal Adviser quoted a passage from the same book under the heading of the **Muslim Court** in which it is stated that

> of significant is the qualification that Muslim Courts established by State authorities have jurisdiction only over Muslims and have no jurisdiction in respect of offences except in so far as conferred by Federal law.

In this particular case, it was argued for the respondents that the parties are Muslims, the right forum is the Syariah Court and on the basis of the affidavit of the respondents it is clear that the case before the Kadi had not yet been disposed, it is infact part heard.

The Ninth Schedule to the Federal Constitution in Federal List I, item 4(e) Islamic personal law relating to marriage, divorce, etc. are excluded but included in the State List II. Also included in the State List are matters pertaining to the Constitution Organisation and Procedure of Syariah Courts, which has jurisdiction only over personal professing the religion of Islam and in respect only of any of the matters included in the paragraph. This provision as well as Article 33(B)(1) of the Kedah State Constitution tend to reinforce the respondents' argument that the applicant's conjugal right is matter over which the High Court has no jurisdiction.

To summarise all the various of arguments for and against the applicant's against the backgrounds, antecedents, chequered history and circumstances of the applicant's foreign marriage to Normala bte. Jusoh across the border in a situation which was some what similar to at one time the well known Gartner Green marriage across the English border in Scotland, it may be said that the law requires the applicant to register his marriage to Normala bte. Jusoh before the expiry date of six months upon producing before the Registrar a marriage certificate or any evidence oral or written to satisfy the Registrar that the marriage has been solemnized (s. 23(1)(a)). The application for registration must of course be made in the form provided for the registration of the marriage so solemnized [23(1)(c)]. Under s. 23(1)(b) the applicant is to give any detail as required by the Registrar for the registration of marriage. Upon being satisfied with all the prerequisites the Registrar may, (as a matter of discretion and judgment, but not as a duty of an imperative ministerial character involving no judgment or discretion on the part of the respondents) register the marriage. In this case both the respondents chose to seek for further information and the attendance of two witnesses along

the applicant before proceeding to hear the applicant's application. This is because the marriage was alleged to have been solemnized in accordance with "Hukum Syariah" through "wali tahkim" which involves the bride appointing on her own accord the Imam as her **"wali tahkim"** and on her own accord request the Imam to marry her to the man of her own choice. This was as a result of an allegation being created as well as a report being made of the girl having been kidnapped and was missing from school as well as threatened to agree to marry the applicant. Somehow or rather both respondents never got down to hearing the case because each time the case was registered, the applicant, through his Counsel decided to withdraw the 1st suit and subsequently when another suit was filed, the applicant, through his Counsel decided to have it withdrawn again. In the interim period it was alleged that Normala bte. Jusoh instituted a complaint and had her marriage repudiated under the repudiatory clause, a condition of the foreign marriage, as six months has lapsed during which she has been separated from the applicant, and subsequently she was legally divorced from the applicant. To make matter worse, Normala had in the meanwhile contracted another marriage with Osman bin Omar with the blessing of her parents. She is now living apparently with her husband and is on family way. In fact her 2nd marriage to Osman bin Omar is awaiting to be registered.

In view of what I have said, it cannot be truly ascertained that both the respondents have not performed their duty as "an imperative ministerial character involving no judgment or discretion on their part." Besides three conditions required under s. 44 as well as 45 of the Special Relief Act 1950 have not been complied with in the sense that the enforcement of the right has been denied to the applicant. If at all in this case (the respondents had not made the right decision), the applicant should have appealed to the Court of Appeal under s. 108 of the Islamic Family Enactment. But in reality the respondents have yet to hear the applicant's application for the registration of his marriage to the girl Normala bte. Jusoh. The case is in fact pending. Under such circumstances it is even doubtful whether there is any right of appeal for him to the Court of Appeal under that section. Unfortunately for the applicant, the turn of events, i.e., Normala's repudiation of her marriage to the applicant and divorce and her subsequent marriage to Osman bin Omar by whom she is now on family way, had frustrated his dire effort to be with her as his lawfully wedded wife. What made matter worse it seems that this case does not fall within the jurisdiction of the High Court to issue an order of *mandamus* because the parties are Muslims and it involves the personal law of Muslims under the Kedah State Constitution was well as the Federal Constitution as clarified by Tun Suffian in his *"Introduction To The Constitution of Malaysia"*.

Taking all these into consideration I am of the view that this is not a fit case which would warrant the High Court to interfere by way of compelling both respondents to act to register the applicant's marriage to Normala bte. Jusoh. Even if I were to do so and issue an Order of Mandamus to compel the respondents to register the marriage, it would only be a case of an academic and judicial exercise because there is no more foreign marriage between the applicant and Normala, as such to be registered since, it may be recalled, that the marriage had been dissolved by way of repudiation of one talak at the instance of Normala bte. Jusoh who has since remarried Osman bin Omar, and by whom she is on family way. What good will to do to insist on registering a non subsisting marriage.

Accordingly I dismissed the applicant's application for an order of *mandamus* with costs.

Also found at [1988] 2 CLJ 763